(9) (10)

No. 98-791, No. 98-796

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL J. KIMEL, *et al.*, *Petitioners*,

vs.

FLORIDA BOARD OF REGENTS, *et al.*, *Respondents*.

UNITED STATES OF AMERICA, *Petitioner*,

vs.

FLORIDA BOARD OF REGENTS, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA HOUSE OF REPRESENTATIVES, REPUBLICAN CAUCUS

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INTEREST OF *AMICUS CURIAE*

The Pennsylvania House of Representatives is one of the two houses of Pennsylvania's General Assembly. The Republican Caucus represents the majority of members of the Pennsylvania House of Representatives.* The House is the appellant in *Young* v. *Pennsylvania House of Representatives, Republican Caucus*, No. 98-7130, in the United States Court of Appeals for the Third Circuit. That court has stayed its consideration of *Young* pending this Court's resolution of this case.

SUMMARY OF ARGUMENT

When it amended the Age Discrimination in Employment Act ("ADEA")[1] in 1974 to add the States to the list of persons governed by it, Congress did not express an unmistakable intent to abrogate Eleventh-Amendment immunity.[2] The provision can be construed as imposing obligations on the States but limiting enforcement to cases brought by the United States, not by private plaintiffs.

Even if Congress intended to abrogate Eleventh-Amendment immunity when it amended the ADEA in 1974, it did not have the power to do so. Although Congress may not abrogate Eleventh-Amendment immunity through its Article I powers, Congress may

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* No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amicus* made a monetary contribution to the preparation of this brief. Letters of consent are on file with the Clerk of Court.

1 29 U.S.C. §§ 621, *et seq.*

2 *Seminole Tribe of Florida* v. *Florida*, 116 S.Ct. 1114 (1996).

do so using its enforcement power under Section 5 of the Fourteenth Amendment. Congress may not use Section 5 to create substantive rights, but Congress may act to enforce the Fourteenth Amendment when there is either a pattern of constitutional violations by the States or a significant likelihood of such violations.[3]

There is no substantial evidence that the ADEA redresses constitutional violations committed by the States or that there is a significant likelihood of such violations. On the contrary, the States have taken legislative action on their own to bar age discrimination in public and private employment, sometimes long before the ADEA.

As a purported remedy, the detailed regulation of employment benefits imposed by the ADEA lacks proportionality to any putative violation of rights. The ADEA is also incongruous with Equal-Protection jurisprudence and with its own stated premise. Classifications based on age are afforded only a rational-basis review[4] and are presumed to be constitutional,[5] yet the ADEA shifts the presumptions and burdens in such a way as to prohibit constitutionally permissible state action. Furthermore, because the ADEA creates rights only for those within various, fluctuating age and income brackets, the ADEA is incongruous with its stated premise of assuring that employment is based on ability not on age.

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[3] *City of Boerne* v. *Flores*, 117 S.Ct. 2157, 2164 (1997).

[4] *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976).

[5] *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

The ADEA really creates substantive economic rights, instead of protecting constitutional rights. It is an example of copycat federalization: Congress seizing popular ideas that originated in the States, without regard to whether they are within the limited powers delegated by the Constitution to the federal government. Applying the ADEA to the States is inconsistent with principles of federalism and undermines the ability of the States to tailor their laws to fit the needs and priorities of their citizens.

ARGUMENT

I. THE ADEA DOES NOT ABROGATE ELEVENTH-AMENDMENT IMMUNITY.

A. Congress did not express its intention to abrogate Eleventh-Amendment immunity with "unmistakable" clarity when it enacted the 1974 amendment to the ADEA.

For Congress to abrogate the Eleventh-Amendment immunity of the States, it must express its intent "in unmistakable language in the statute itself."[6] The language of the ADEA does not express an unmistakable intent to abrogate. Section 630 of the statute merely adds States to the list of employers it covers; it does not address immunity or the availability of private actions. Indeed, the language of Section 630 parallels the language in the Fair Labor Standards Act

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[6] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985); *Dellmuth* v. *Muth*, 491 U.S. 223, 231 (1989).

("FLSA")[7] prior to 1974 that was held inadequate to demonstrate an intent to abrogate.[8]

Petitioners and the United States argue that, because the ADEA incorporates certain enforcement provisions of the FLSA and because Congress amended the FLSA in 1974 in an attempt to abrogate immunity, the ADEA therefore abrogates immunity. However, it is not at all clear that the amended FLSA itself abrogates Eleventh-Amendment immunity.[9] Therefore, its incorporation into the ADEA is not the "unmistakable" indication Congress is required to offer. Moreover, the ADEA has its own remedy provision and its own conferral of jurisdiction on "any court of competent jurisdiction." The way to harmonize the two statutes is to read into the ADEA only those parts of the FLSA that do not overlap or negate existing provisions of the ADEA.[10]

Finally, the same Congress that amended the FLSA in response to *Employees* amended the ADEA to add the States to the list of covered employers, a device that failed to abrogate immunity in the previous version of the FLSA. Indeed, the two amendments were part of the same bill.[11] It is hard to find an "unmistakable" intent when, in the same bill, Congress added

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7 29 U.S.C. §§ 201, *et seq.*

8 *Employees of the Department of Health and Welfare* v. *Missouri Public Health Dept.*, 411 U.S. 279, 282, 83 (1973).

9 *See Kimel v. State of Florida Board of Regents*, 139 F.3d 1426, 1432 n.11 (CA11 1998) (opinion of Edmondson, J.).

10 *Mackey* v. *Lanier Collections Agency*, 486 U.S. 825, 837 (1988).

11 Pub.L. 93-259 §§ 6(d)(1) and (2) (1974).

purportedly curative language to one statute and the old non-curative language to the other.[12]

B. The ADEA could not be a valid exercise of Congress's power under the enforcement provision of the Fourteenth Amendment.

The ADEA is a Commerce-Power enactment.[13] Because a Commerce-Power enactment cannot abrogate Eleventh-Amendment immunity, the question becomes whether the ADEA is also a Fourteenth-Amendment enactment. "[W]e should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."[14] The ADEA does not express an intent to enforce the Fourteenth Amendment. The legislative findings that serve as the statute's preamble speak to commercial concerns rather than to those encompassed by the Fourteenth Amendment.

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[12] The United States responds to this argument by suggesting that Congress did not amend the ADEA because it knew that the ADEA incorporated Section 216 of the FLSA and, so, only the FLSA required amendment. The problem with that argument is that, had Congress acted with such precision, it would not have amended the ADEA at all. The FLSA already provides that public agencies are proper defendants and, so, there would have been no point to amending Section 630 of the ADEA to include the States.

[13] *EEOC* v. *Wyoming*, 460 U.S. 226, 243 (1983).

[14] *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 16 (1981).

In *City of Boerne* v. *Flores*,[15] the Court delineated when statutes may be deemed properly enacted under the Fourteenth Amendment.

> Congress' power under § 5 [of the Fourteenth Amendment], however, extends only to "enforc(ing)" the provisions of the Fourteenth Amendment. The Court has described this power as remedial....Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to define what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[16]

Put another way, Section 5 of the Fourteenth Amendment is not a license for Congress to impose whatever policies it might wish on the States; rather, it is a tool for Congress to remedy violations of existing constitutional rights.[17]

The 1974 amendment to the ADEA cannot pass constitutional muster as remedial legislation because it goes significantly beyond what the Court has held to be protected under the Fourteenth Amendment. "The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."[18]

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15 117 S.Ct. 2157 (1997).

16 117 S.Ct. at 2164 (citation omitted).

17 117 S.Ct. at 2163-64.

18 *Oregon* v. *Mitchell*, 400 U.S. 112, 126-27 (1970).

1. The extension of the ADEA to the States was not a proportionate response to a history of unconstitutional state actions.

In *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*,[19] the Court said

> We thus held [in *City of Boerne*] that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and it must tailor its legislative scheme to remedying or preventing such conduct.[20]

In *City of Boerne*, the Court found a lack of such historic findings to support the Religious Freedom Restoration Act ("RFRA"), and, in *Florida Prepaid*, it found a lack of legislative history suggesting that Congress found a "pattern of patent infringement by the States, let alone a pattern of constitutional violations."[21]

The legislative history of the 1974 amendment of the ADEA that added States as covered employers likewise fails to reveal any pattern of age discrimination by the States. Indeed, the legislative history of the 1974 amendment makes no reference to a history of unconstitutional age discrimination by the States.[22]

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19 No. 98-531, 1999 WL 412723 (U.S. June 23, 1999).

20 *Florida Prepaid*, 1999 WL 412723 at *8.

21 *Id.*

22 *See Kimel*, 139 F.3d at 1448 (Opinion of Judge Cox).

In lieu of legislative history of the 1974 ADEA amendment, the United States cites a statement in 1972 by Sen. Lloyd Bentsen of Texas, in support of a proposal to extend the ADEA to state and local governments.

> Mr. President, there is mounting evidence that employees of Federal, State, and local governments are being denied that free choice between productive work or adequate retirement income. In fact, there are strong indications that the hiring and firing practices of governmental units discriminate against the elderly, frequently pressuring them into retiring before their productive days are over.[23]

Sen. Bentsen described his "mounting evidence."

> [R]ecent articles in the Wall Street Journal, the Washington Post, and the Washington Star, as well as case studies collected by the National Federation of Federal Employees, reveal that age discrimination practices are occurring at the Federal level. Letters from my own State have revealed that State and local governments have also been guilty of discrimination toward older employees.
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> Elliott Carlson, writing in the Wall Street Journal on January 20, quotes a number of elderly federal employees who have been subject

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[23] 118 Cong. Rec. 7745 (March 9, 1972) (statement of Sen. Bentsen).

> to pressures as the result of recent "reduction in force" orders issued by Federal agencies.[24]

Sen. Bentsen's statement is merely an allusion to evidence, not evidence itself, and it was never scrutinized by the Congress that amended the ADEA. It is impossible to determine whether he was referring to *unconstitutional* discrimination. In any event his allusion is to age discrimination by the federal government and by the state and local governments in Texas.[25] Such "evidence" does not meet the standard enunciated in *City of Boerne*.[26]

The United States and Petitioners Kimel, *et al.*, attempt to demonstrate that Congress had before it sufficient evidence to support an exercise of Section-5 powers. However, they ignore the Court's admonition in *Florida Prepaid* that the legislative fact-finding must focus on violations of the constitution *by the States*. Instead, the United States and Petitioners Kimel, *et al.*,

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[24] *Id.*

[25] The bill Sen. Bentsen introduced in 1972 was not enacted, a fact that supports the inference that Sen. Bentsen's colleagues did not find his evidence either convincing or comprehensive enough to warrant federal action. It debases the concept of legislative history to treat the Congressional Record like *Bartlett's Quotations*, extracting something said at some time to support any position.

[26] *See Florida Prepaid*, 1999 WL 412723 at *11 ("The legislative record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic §5 legislation."). As noted below, by the time Sen. Bentsen made his statement, Pennsylvania had prohibited age discrimination against state employees for 17 years. *See, infra*, n.33.

point to the general legislative history of the ADEA, most of which regards private employers and is therefore, irrelevant to the Section-5 analysis.[27]

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[27] Some of their references are either inapposite to the issue of state action or actually show the States in a good light. For example, both Petitioners Kimel, *et al.*, and the United States point to a Senate Committee Report in 1973 for the statement that "[t]here is also evidence that, like the corporate world, government managers also create an environment where young is somehow better than old." S. Rep. No. 846, 93d Cong., 2d Sess. 112 (1973). That portion of the report was addressing federal employees. The United States cites a statement by Rep. Steiger during the congressional debate in 1967 on the ADEA itself. However, debate seven years before enactment, by a wholly different Congress, is not legislative history. *Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977) ("It is the intent of the Congress that enacted [the section] that controls."). Moreover, a statement made in support of a measure that is rejected cannot be called legislative history of a later enactment; after all, the majority of the Congress that heard the endorsement in the end rejected the bill. In any event, the remarks demonstrate the opposite of what the United States suggests: Rep. Steiger was quoting testimony about a Wisconsin school board (not the State) that refused to renew the contract of a 51-year-old teacher. In a portion not noted by the United States, the testimony revealed that the Wisconsin Industrial Commission "bluntly ordered the school board to renew the teacher's contract...." 113 Cong. Rec. 34,742. The United States cites a statement by Rep. Donohue during the same 1967 debate. However, Rep. Donohue spoke only generally about "business, industry, and even the Government [feeling] that those citizens entering middle age are too old to begin any new employment." 113 Cong. Rec. 34,749. He offered no examples and his reference to "the Government" suggests federal, not state government. The result of the 1967 debate was the ADEA in its original form, which expressly exempted the States and their subdivisions. The United States likewise points to several statements in the

The second problem with the legislative "history" the United States has offered is that much of it is not "history" at all. Many of the references are from proceedings *after* the 1974 amendment to the ADEA.[28] Such "history" is irrelevant.[29] The Court will search the briefs of the United States and Petitioners Kimel, *et al.*, in vain for any example of age discrimination by the States that was identified by the Congress that considered the 1974 amendment to the ADEA.

The United States offers 1990s social science to fill the gap in legislative history. Even if such contemporary, non-legislative sources were relevant, they do not support the notion that the ADEA is a proper Fourteenth-Amendment enactment. One study cited by the United States in the Third Circuit (but not in this Court) found that

> the customary justification for this body of law can no longer be applied, if it ever could, to all of the prohibitions against different forms of

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House of Representatives and the Senate during the 1964 debate on Title VII of the Civil Rights Act of 1964. Of course, Congress considered adding age as a protected class in Title VII and declined to do so. Finally, the United States refers to the statement of Sen. Sparkman during the 1964 debates and quotes him as announcing that "a person who is 40 or 45 years old finds it almost impossible to get a job, either in the Government or in private industry." 110 Cong. Rec. 9,912. Sen. Sparkman was referring to the *federal* government.

[28] *See, e.g.*, Brief of the United States at 35-38, n.38-41.

[29] *Teamsters*, 431 U.S. at 354 n.39 (1977); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979) (quotation omitted) ("We are not persuaded. Senate Report 95-493 was written 11 years after the ADEA was passed in 1967, and such legislative observations are in no sense part of the legislative history.").

> discrimination. The ADEA, in particular, cannot be justified in terms of opening opportunities to a historically disfavored group. Those 40 years old or older are not politically powerless and do not, as a group, suffer from economic disadvantages. On the contrary, those who sue under the ADEA tend to be white males who are relatively well off in status, positions, and pay. It is therefore necessary to turn to other justifications for the ADEA. These have yet to be supplied, and if they are not, both the breadth of and the need for the ADEA must be reexamined.[30]

Thus, whether viewed at the time of its enactment in 1967, at the time of its amendment in 1974 or today,

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[30] George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 521 (1995) (emphasis added). Professor Rutherglen collected statistics that show that 57 per cent of ADEA cases are brought by professional or managerial employees who are economically well-off white men. *Id.* at Table 1. Finally, Professor Rutherglen noted that "there is no evidence that older workers on the whole are worse off than younger workers, although the earnings of unskilled workers do tend to decrease before retirement." *Id.* at 499. A number of other researchers have reached the same conclusion. *See, e.g.*, Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 852 (1982) (citing U.S. Dept. of Labor, *The Older American Worker: Age Discrimination in Employment* 3 (1965)) ("Not only have older workers not suffered from lifelong discrimination, but any discrimination to which they are currently subject is not a product of invidious stereotypes and hatred, as with other types of discrimination.").

the ADEA cannot be viewed as a remedy for historic mistreatment of older Americans by state action.[31]

Even if the material offered in the opposing briefs could constitute sufficient evidence to support *some* congressional action, one could not reasonably view the ADEA as "carefully delimited remediation"[32] Like the RFRA struck down in *City of Boerne* and the patent provision at issue in *Florida Prepaid*, the ADEA purports to affect all States, at all levels, for an indefinite period of time. This expansive intrusion on state sovereignty cannot be justified as a remedy to any perceived constitutional wrong.

For example, Sen. Bentsen described age discrimination in the federal government and in his home State of Texas. He did not – and indeed could not – describe widespread age discrimination in other state governments. By 1955, for instance, the Pennsylvania General Assembly had enacted legislation that prohibited age discrimination and extended its

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[31] Not only did Congress not *actually* find evidence of age discrimination in employment by the States, it could not have. A review of pre-1974 federal cases reveals virtually no Section-1983 suits based on age discrimination in employment.

[32] *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, No. 98-149, 1999 WL 412639 at *5 (U.S. June 23, 1999) (citation omitted) ("We made clear in *City of Boerne* v. *Flores*, that the term 'enforce' is to be taken seriously – that the object of valid §5 legislation must be the carefully delimited remediation or prevention of constitutional violations.").

protection to state employees.[33] That law was, in fact, broader in its protections than the ADEA.

An examination of the contours of the ADEA's protections leaves one with the distinct impression that it was tailored not to prevent constitutional violations but to meet the vagaries of a changing political climate. One cannot reasonably conclude that the peculiar contours of the ADEA were designed with remediation in mind.

2. The extension of the ADEA to the States lacks congruity to the purported problem.

In *City of Boerne*, the Court said that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[34] The ADEA lacks congruence for two reasons.

a. Incongruous presumptions.

In *Massachusetts Bd. of Retirement* v. *Murgia*,[35] the Court held that "old age does not define a 'discrete and insular' group . . . in need of 'extraordinary protection from the majoritarian political process.'" Accordingly, the Court determined in *Murgia* that age

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33 43 P.S. §§ 951, *et seq.* *See, infra*, n.54. Pennsylvania was not alone. A significant number of States prohibited age discrimination by public entities before 1974. *See, e.g.*, 10 N.J.S.A. § 10:3-1 (New Jersey law prohibiting age discrimination in hiring state employees).

34 117 S.Ct. at 2169.

35 427 U.S. 307, 313 (1976) (quotation omitted).

classifications warrant only the least searching level of scrutiny, rational-basis review.[36]

Rational-basis is the level of review given to most state actions under the Equal Protection Clause. The rational-basis inquiry is a deferential one and, under it, courts must sustain state action unless the varying treatment of different groups or persons bears no rational relationship to any legitimate state purpose.[37]

This lower degree of scrutiny distinguishes age classification from typical forms of discrimination addressed in Fourteenth-Amendment-based remedial statutes. Title VII of the Civil Rights Act of 1964[38] proscribes discrimination based on "race, color, religion, sex, or national origin" – all categories that merit at least some form of heightened scrutiny.

One district court that found that the ADEA successfully abrogates immunity held that "[t]he particular standard applied by a court does not define the presence or absence of Fourteenth Amendment protection."[39] That statement is correct, but it misses the point. The question is not whether a particular group is to be afforded *any* Fourteenth-Amendment protection. Everyone is protected by it. The real question is, instead, whether Congress has an unlimited license to second-guess a State's rationally

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36 427 U.S. at 313.

37 *Frontiero* v. *Richardson*, 411 U.S. 677, 683 (1973).

38 42 U.S.C. §§ 2000e, *et seq.*

39 *Young* v. *Pennsylvania House of Representatives, Republican Caucus*, 994 F. Supp. 282, 287 (M.D. Pa. 1998).

based non-suspect classifications by enacting broad-based "enforcement" legislation.[40]

In analyzing classifications meriting a rational-basis review, the Court has held that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions *presume* the constitutionality of the statutory discriminations. . ."[41]

In *City of Boerne*, the Court explained that "[p]reventative measures prohibiting certain types of laws may be appropriate *when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.*"[42] If classifications based on age are *presumed* to be constitutional, it is difficult to imagine that "many" of the state actions governed by the 1974 amendment to the ADEA have a "significant likelihood of being unconstitutional."[43] However, the ADEA overcomes the inconvenience of a lack of violations of

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[40] For example, the statute at issue in *City of Boerne* sought to enforce First-Amendment rights to free exercise of religion. There is no question that the general rights Congress sought to vindicate are protected by the First Amendment. The issues were (1) whether they were the proper subject of a Fourteenth-Amendment enforcement statute and (2) whether that statute was proportional to the wrong to be addressed. Had the Court based its analysis in *City of Boerne* on a foundation of whether free exercise of religion is in any sense constitutionally protected, it would inevitably have found the RFRA constitutional.

[41] *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (emphasis added).

[42] *City of Boerne*, 117 S.Ct. at 2170 (emphasis added).

[43] *Id.*

constitutional rights by creating statutory ones. The ADEA grants to a plaintiff who has made out a *prima facie* statutory case a presumption of "wrongful" (*i.e.*, contrary-to-statute) discrimination.[44] There is an irreconcilable clash of presumptions.

Because of these conflicting presumptions, a plaintiff who sues only under Section 1983 would likely get a different result than an identical plaintiff suing under the ADEA. The ADEA is thus incongruous with any purported need to protect constitutional rights.

To open the Fourteenth-Amendment enforcement portal to classifications that receive only a rational-basis review would be effectively to remove any limitation. Practically all laws and government actions discriminate or classify in one sense or another.[45] Virtually any classification made by a State is afforded at least a rational-basis review.[46] Accordingly, a determination that rational-basis classifications can be undone by congressional mandates to the States would change what was intended to be merely an enforcement mechanism into general governmental power through which Congress could regulate almost all state action or legislation.

b. Incongruity with purposes.

The ADEA is incongruous with its own stated purposes, as well as with any purported enforcement of Fourteenth-Amendment rights. The purpose of the ADEA is "to promote employment of older persons

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44 *See Rabinovitz* v. *Pena*, 89 F.3d 482, 486 (CA7 1996).

45 *Clements* v. *Fashing*, 457 U.S. 957, 968 (1982).

46 *Dukes*, 427 U.S. at 302-3.

based on their ability rather than age; to prohibit arbitrary age discrimination in employment. . ."[47] Yet the ADEA arbitrarily does not begin protecting workers until they reach 40. Police and firefighters have been both included and excluded and may be retired (sometimes) at 55.[48] An employee may be arbitrarily fired at 65, if the employee is an executive with a good pension.[49] Thus, under the ADEA, two 66-year-old women whose abilities are precisely alike can be treated differently by an employer if one is better-compensated than the other.

This incongruity with purpose is jarring when compared with other statutes. Title VII, for example, does not allow an affluent black person to be fired based on race. Even the designation of a protected age range is incongruous with Equal Protection. If Title VII borrowed the language of the segregationists and limited its protection to "persons of color, between quadroon and octoroon," we would all be outraged. Such a classification would mock the goal the statute purported to reach, yet the ADEA does exactly that.

As the Court noted in *Murgia*, the designation of age as a classification itself is awkward:

> But even old age does not define a "discrete and insular" group in need of "extraordinary protection from the majoritarian political

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47 29 U.S.C. §621(b).

48 29 U.S.C. § 623(j). Indeed, Section 623(j) includes several "grandfathering" provisions incongruous with Equal Protection.

49 29 U.S.C. § 631(c).

> process." Instead, it marks a stage that each of us will reach if we live out our normal span.[50]

When the ADEA is viewed in its entirety, its incongruities are understandable. The ADEA is really a detailed regulation of employment and retirement benefits, not a genuine exercise of enforcement power under the Fourteenth Amendment.[51] It centralizes authority over another area that would normally be within the residual powers of the States.

II. CONGRESSIONAL SECOND-GUESSING OF RATIONALLY-BASED STATE ACTIONS DESTROYS THE DUAL SOVEREIGNTY THAT BEST PROTECTS OUR LIBERTY.

The dual sovereignty that is the essence of our federalism requires the existence of States with a core competence that cannot be overridden or second-guessed and of a federal government that also enjoys supremacy in its sphere. This structure has played, and continues to play, an important role in safeguarding liberty. However, there is an opposing view of federalism that seems to place no value on the sovereignty of the States as a protection of liberty. Part II of Justice Breyer's dissent in *College Savings Bank*

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50 427 U.S. at 313-14.

51 *See, e.g.*, 29 U.S.C. § 623(f) (permitting enforcement of otherwise prohibited acts "pursuant to the terms of a bona fide employee benefit plan . . ."); 29 U.S.C. § 623(i) (regulating employee benefit plans); 29 U.S.C. § 623(j) (regulating employment as firefighter or law-enforcement officer); 29 U.S.C. § 623(l) (permitting minimum age for vesting of retirement benefits and actuarial adjustments of benefits based on age).

views our federalism as one of changing doctrines but unchanging goals.

> But those changing doctrines reflect one unchanging goal: the protection of liberty. Federalism helps to protect liberty not simply in our modern sense of helping the individual remain free of restraints imposed by a distant government, but more directly by promoting the sharing among citizens of governmental decisionmaking authority.[52]

While *Amicus* agrees that protecting liberty is the most important goal of federalism, *Amicus* respectfully submits that the dissent overlooks how dual sovereignty achieves it and offers an insecure and partial protection in its stead.

The form of "sharing" of decisionmaking authority favored by the dissent in *College Savings Bank* is at issue under the ADEA: the private right of action. However, the filing of lawsuits is not governmental decisionmaking. The plaintiff is a mere supplicant, constrained by burdens of proof and the limited remedies that the courts may afford.

In contrast, the States, much more so than the federal government, are really "promoting the sharing among citizens of governmental decisionmaking authority," by affording their citizens innumerable opportunities to exercise real governmental authority, both as public officers and as voters whose ballots have equal weight in state and local affairs. The

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[52] *College Savings Bank*, 1999 WL 412639 at *22 (Breyer, J., dissenting).

Commonwealth of Pennsylvania, for example, has more than 27,500 elected officials. Most of them are citizens who serve unpaid on school boards and municipal bodies. In addition to the elected officials, thousands more serve as appointees on state and local boards and commissions.

All the citizens of Pennsylvania share in this distribution of authority, because they choose each of their elected officials on a one-person-one-vote basis, including, since 1851, their judges. In contrast, not a single federal official is chosen on a one-person-one-vote basis.[53] Similarly, in the New England States, town-meeting government, in which each voter is a legislator, contrasts with the type of "town meeting" at which federal officials often hold court. Likewise, in States where the initiative and referendum exist, every voter is a lawmaker.

This widely spread and deeply rooted democracy continually gives birth to new policies and priorities, which often precede congressional awareness of the issues. For example, Pennsylvania's Fair Employment Practice Act[54] outlawed age discrimination in employment 12 years before the ADEA was first enacted and 19 years before Congress extended it to cover the States. By the time Congress acted, with other States also adding momentum, Congress

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53 See. *infra*, n.69.

54 Act of October 27, 1955, No. 222, P.L. 744. This statute, binding the Commonwealth itself as well as other public and private employers, also banned employment discrimination on the basis of race, religion or ethnicity. The United States notes that at least 49 States have prohibited the use of age as a proxy for ability in most public employment decisions. Brief of the United States at 42 n.46.

undoubtedly saw political advantage in adding its voice to the chorus.

Congress often expropriates from the States ideas that have less to do with national affairs than with the famous dictum of one of its members that "all politics is local." But such copycat federalization, each time it occurs, enervates citizenship at the state and local levels a little bit more. When there can be a federal solution for every concern and a federal policy to trump every local distinction, the importance of being an active citizen in state and local affairs is diminished. Moreover, Congress often standardizes a compromised version of the original idea and stifles continued experimentation in the field. Instead of being its enabler and apologist, the Court should put bounds on the impulse of federal elected officials to try to be mayor, school board, governor, assemblyman and sheriff. In a system of dual sovereignty, there must be some ideas, no matter how good or popular they are, that cannot be usurped by the federal government, just as there are others that cannot be adopted by the States.

The "sharing" of authority through private rights of action is not a substitute for vigorous citizenship in the States as a protection of liberty. Private rights of action exist at the sufferance of Congress, which takes away as often as it gives.[55] Real liberty lies in rights

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[55] Consider, for example, the wavering boundaries of the protected class in the ADEA itself, which changed in 1984 and 1986. In 1986 and 1989, Congress changed the definition of "normal retirement age" in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(24). ERISA has also placed in doubt whether certain state-law rights of action are barred. 29 U.S.C. § 1144. The Price-Anderson Act

that cannot be taken away. The right of citizens to govern themselves in the States, using the "numerous and indefinite" powers reserved to them, is such a liberty.[56]

The liberty of being a citizen of a State with real, although shared, sovereignty results from the structure created by the Framers that divided power, not just among the branches of the federal government, but between the federal government and the States. This liberty seems a useless, duplicative burden to many in our complacent society, and a vestigial nuisance to many who wield federal power, but it is still, for the long run, an important buttress of democracy. As the Court explained in *Gregory* v. *Ashcroft*,[57]

> [t]his federalist structure of joint sovereigns...assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.
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of 1957, 42 U.S.C. §§ 2210, *et seq.*, set a limit of $560 million in potential damages for any one nuclear accident and effectively displaced state-law remedies.

[56] *United States* v. *Lopez*, 514 U.S. 549, 552 (1995) (*quoting* THE FEDERALIST No. 45 at 292-293 (C. Rossiter ed. 1961)).

[57] 501 U.S. 452, 458 (1991).

> [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.[58]

If the States have sovereignty only at the sufferance of the federal government, a key safeguard of liberty is removed. To be a real safeguard, federalism has to be more than a one-way street, with Congress imposing obligations on the States and creating causes of action against them.[59]

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58 501 U.S. at 452 (citations and quotations omitted).

59 Although space does not permit a survey here, a comparison of our federalism with modern "federal" constitutions of other nations would show that the "states" in these countries are typically appendages of the central power, without sovereignty. Some well-known but "legal" breakdowns of democracy suggest the insufficiency of such centrist structures. Under the Weimar Constitution, a conservative federal Chancellor commandeered the liberal government of the state of Prussia; when he was succeeded by Hitler, the latter was able to appoint Goering Interior Minister of Prussia, with control over that state's large police force. *See* BULLOCK, HITLER: A STUDY IN TYRANNY at 177-178 and 220 (Bantam 1961) and WIEMARER REICHSVERFASSUNG, Artikel 48. Under the Indian Constitution, Indira Gandhi could replace state governors, have state legislatures prorogued and otherwise compel the states to act, helping to sustain her rule during a "state of emergency." *See* CONSTITUTION OF INDIA, Articles 156, 174, 248, 256, 257. While our democratic traditions seem secure at present, our constitutional structure of dual sovereignty is designed to preserve liberty no matter what conjunction of social upheaval and political ambition might occur in the future. Statutory private rights of action, as a protection of liberty, would evanesce in the heat of a real test of a constitution.

The dissent in *College Savings Bank* may have undervalued state sovereignty because it misread much of the history it invokes. The dissent said that "the Civil War effectively ended the claim of a State's right to nullify a federal law."[60] However, nullification did not precipitate the Southern rebellion.[61] From the perspective of *Amicus*, the true "states rights" issue before the war was that the slave States (while posturing as champions of states' rights) were using the organs of federal power to extend slavery into the free states, against the will of their citizens, and into federal territories.[62] Even Pennsylvania's efforts to prevent the kidnapping of her black citizens were stifled by federal power.[63] Pennsylvania did not invoke the nullification doctrine, despite these affronts to liberty. Nevertheless, the existence of a free state government was a focus for the political opposition to slavery and, through passive non-cooperation, at least a partial check on the enforcement of the Fugitive Slave Act.

The dissent in *College Savings Bank* also expressed the fear that state sovereign immunity "threatens the Nation's ability to enact economic legislation needed for the future in much the way that *Lochner* v. *New York* threatened the Nation's ability to

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60 *College Savings Bank*, 1999 WL 412639 at *22 (Breyer, J., dissenting).

61 The rebellion of the southern States occurred when, following the rise of the Republican Party and the election of Lincoln, they realized they would have neither the cooperation of the free States nor control over federal enforcement of the Fugitive Slave Act.

62 *See Scott* v. *Sandford*, 19 How. (60 U.S.) 393 (1857) (the *Dred Scott* case).

63 *See Prigg* v. *Pennsylvania*, 16 Pet. (41 U.S.) 539 (1842) (overturning Pennsylvania's Personal Liberty Law).

enact social legislation more than 90 years ago."[64] Again, from *Amicus'* point of view, *Lochner* was an exercise of federal power to suppress social initiatives that the States were undertaking internally. It was a limitation *by*, not *on*, the national government.[65] If the Court had respected state sovereignty in *Lochner*, the States could have enacted the social legislation that might have ameliorated the later consequences of the Great Depression. The state statute stuck down in *Lochner*, like the state statutes that preceded the ADEA, also stands in refutation of the contention that the States, without some federal leavening, would engage in a "race to the bottom" in health, safety and welfare legislation.[66]

The *College Savings Bank* dissent contended that "a federal court's ability to enforce its judgment against a State is no longer a major concern."[67] *Amicus* construes this to mean that the Court does not doubt its power to enforce a judgment against a State. However it is a major concern to a State for its impact on its treasury. The States bear a burden that comes with the doctrine that the general, residual powers of government are vested in them: the States must continually make difficult choices about allocating their limited resources across the entire spectrum of general government operations. Congress, with narrower

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64 *College Savings Bank*, 1999 WL 412639 at *21 (Breyer, J., dissenting).

65 *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), was the case that crippled Congress's power to condition the transport of goods and services across state lines on compliance with social welfare objectives.

66 *College Savings Bank*, 1999 WL 412639 at *22 (Breyer, J., dissenting).

67 1999 WL 412639 at *23 (Breyer, J., dissenting).

responsibilities, has the luxury of ignoring the unglamorous but essential local services the States must provide. Inevitably some State programs will not receive the resources they could use to improve their performance. On any given day, Congress can pick a state program needing improvement (just as federal programs can be criticized in turn). But when Congress makes such selective demands, it is forcing a change of priority on the States. The sum of such changes can amount to a large-scale reordering of a State's budget, without necessarily achieving a net gain in service to the public.

No State should object to a forced change in priorities when Fourteenth-Amendment rights are being violated. However, when Congress is merely overriding the rationally-based classifications of the States to express its own preferences, the Court should not defer to it.

The United States argues that the Court should defer to congressional judgment in this area because judicial review is anti-democratic, but congressional judgments are not.[68] The United States is right to appeal to principles of democracy, but wrong in its implicit assumption that deference on the basis of these principles should be given to Congress rather than to the legislatures of the States. Congress is not established on a one-person-one-vote basis.[69] The

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68 Brief of the United States at 23.

69 Based on the 1990 U.S. Census and the distribution by State of seats in the U.S. House of Representatives, there are large disparities in representation in the House. The congressional district with the largest population is 176 per cent the size of the district with the smallest population. Although congressional districts within each State are equal

governments of the States are. The exercise of the general powers of government should be founded on the one-person-one-vote principle.[70] Our national government, which is not and cannot be based on that principle, must limit itself to the "few and defined" powers that the constitutional compromise confers on it. Not the least of its delegated powers is its power to enforce the Fourteenth Amendment.

However, if Congressional enforcement power is construed into a plenary grant of authority over the States, then, together with an expansive reading of the Commerce Clause, the federal government will acquire a general police power over all persons and entities. It will become "a parliament of the whole people, subject

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in population, nationally the deviation from the average ranges from 20 per cent less to 40 per cent more. The U.S. Senate, of course, is not representative of population. For example, senators representing less than five per cent of the American people constitute 26 per cent of the voting power of the Senate. The election of a president is skewed by the reflection of these disparities in the Electoral College. These representational disparities are increasing as population shifts: according to the first census, in 1790 the largest State was only about 12 times more populous than the smallest State, but in 1990 our largest State was 65 times more populous than our smallest.

[70] *See Reynolds* v. *Sims*, 377 U.S. 533, 556 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

to no restrictions save such as are self-imposed."[71] The States, in turn, will "be relegated to the role of mere provinces or political corporations."[72]

No one should relish such an outcome, because such a national general government would lack a principled foundation in one-person-one-vote representation for assuming such power. Moreover, because the States would still be the constitutionally-defined constituencies from which federal officials are elected, smaller States and congressional districts could justifiably be regarded by the larger ones as "rotten boroughs" because of overrepresentation in the general government. Under the British constitution, Parliament was able to ameliorate the inequities of representation by passing Reform Bills. Our Constitution does not allow such remedy.

On democratic principles, then, the judgment of each State as to rationally-based classifications should be given deference over that of Congress. These democratic principles are supported by common sense and experience.[73] Although as a nation we have many common interests, the States continue to have differences and unique perspectives. Pennsylvania, for example, has the nation's second oldest population, as well as the fifth largest city and largest rural population. Pennsylvania has established a Department

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[71] *South Dakota* v. *Dole*, 483 U.S. 203, 217 (O'Connor, J., dissenting) (quoting *United States* v. *Butler*, 297 U.S. 1, 78 (1936)).

[72] *See Alden* v. *Maine*, No. 98-436, 1999 WL 412617, at *2247 (U.S. June 23, 1999).

[73] *See Sims*, 377 U.S. at 564-65 ("State legislatures are, historically, the fountainhead of representative government in this country.").

of Aging to administer a variety of programs for older citizens in its unique mix of urban and rural settings.[74] If Congress can impose its will on the Commonwealth under the ADEA, Congress could in theory override everything Pennsylvania has done in its programs on aging.[75] Yet a one-size federal program that covered Montana as well as Pennsylvania would undoubtedly fit neither very well. Congress could even, on the principles espoused in the brief of the United States, amend the ADEA to override the minimum ages in state constitutions for holding public office. However, the Fourteenth Amendment does not give Congress plenary power to restructure the governments that the citizens of each State have established for themselves.[76]

CONCLUSION

The Pennsylvania House of Representatives, Republican Caucus, respectfully requests that the Court affirm the decision of the Eleventh Circuit.

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74 *See* 71 P.S. § 581-1 *et seq.*

75 For example, could Congress modify or prohibit Pennsylvania's state-lottery-funded subsidy of public transportation for persons 65 and older? *See* 72 P.S. § 3761-2. Could Congress extend it, at the State's expense, to those older than 40 or insist that it be narrowed to have an income cap on eligibility, *a la* the ADEA? Could Congress change these parameters from year to year, as it has in the ADEA, at the behest of national lobbying groups? On the principles espoused by the brief of the United States, Congress could do so, with serious fiscal impact on the Commonwealth.

76 *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).